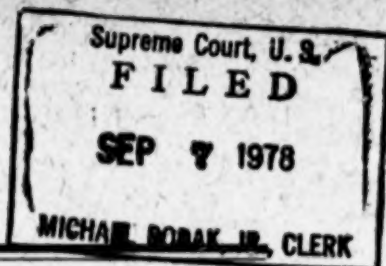


No. 78-48



---

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

---

STANLEY SPIEGEL, PETITIONER

v.

CHARLES A. MOYE, JR., JUDGE,  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

---

No. 78-48

STANLEY SPIEGEL, PETITIONER

v.

CHARLES A. MOYE, JR., JUDGE,  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

Petitioner contends that he is entitled to a writ of mandamus or prohibition overturning the district court's reconsideration of an order granting him a new trial.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of 30 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to six and one-half years' imprisonment, to be followed by five years' probation. His direct appeal is pending before the United States Court of Appeals for the Fifth Circuit.

Petitioner's trial was completed in August 1974. He filed a timely motion for a new trial and, on June 11, 1976, shortly after trial transcripts were completed, an amended motion with supporting brief (Pet. App. A-24, A-29, A-30). On April 13, 1977, the district court granted

petitioner a new trial on the ground that reversible error had occurred when the court permitted the defendants to waive a twelve-juror verdict by written stipulation of counsel after one juror was discharged because of illness, and that the effect of this error was enhanced by another error, subsequently identified as the giving of a jury instruction similar to the one condemned in *Mann v. United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986 (Pet. App. A-40, A-170 to A-171). The government moved for reconsideration of the new trial order on April 20, 1977, and on October 26, 1977, the district court vacated its order granting a new trial (Pet. App. A-170 to A-171).<sup>1</sup> After further delays at petitioner's request, he was sentenced in February 1978. Although his direct appeal was pending, petitioner filed a petition for a writ of mandamus and/or prohibition in the court of appeals on April 10, 1978, which was denied on June 6, 1978 (Pet. App. A-4).

It is not entirely clear whether petitioner is seeking review of that denial or is asking this Court to issue a similar writ. In either event, the extraordinary remedy of mandamus would not be the proper vehicle by which to test the propriety of the district court's reconsideration of its new trial order, since petitioner's claims in that regard can be raised in his pending appeal. See *Will v. United*

<sup>1</sup>The district court was initially of the opinion that the Fifth Circuit's decision in *United States v. Chiantese*, 546 F. 2d 135, would mandate reversal of any conviction based on the verdict of a jury given the *Mann* instruction. However, on rehearing *en banc* in *Chiantese*, the Fifth Circuit made its rule against use of the *Mann* instruction prospective only (560 F. 2d 1244, 1256); accordingly, the district court found it unnecessary to order a new trial on that ground (Pet. App. A-170 to A-171). The court also concluded on reconsideration (Pet. App. A-171) that its acceptance of defense counsel's written waiver of defendants' statutory right to a jury of twelve was not error.

*States*, 389 U.S. 90; *Parr v. United States*, 351 U.S. 513. See also *Kerr v. United States District Court*, 426 U.S. 394, 402-403. Accordingly, further review of the decision of the court below is not warranted.<sup>2</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
Solicitor General.

SEPTEMBER 1978.

<sup>2</sup>Petitioner's claim that the district court lacked power to reconsider the new trial order is, in any event, without merit. He cites no authority supporting the proposition (Pet. 19-27) that a trial court lacks jurisdiction to vacate an interlocutory order granting a new trial before jeopardy attaches in the second trial; and dictum in *United States v. Spinella*, 506 F. 2d 426, 431 (C.A. 5), certiorari denied, 423 U.S. 917, a case on which petitioner relies, is to the contrary. *United States v. Smith*, 331 U.S. 469, relied on by petitioner (Pet. 24-25), is inapposite, holding only that a district court judge is without power to reverse, *sua sponte*, his order denying a new trial after the defendant's conviction has been affirmed on appeal. Similarly groundless is petitioner's contention (Pet. 27-32) that the government's failure to comply with a local court rule applicable to the filing of its motion for reconsideration of the new trial order deprived the district court of jurisdiction to consider the government's motion. It is settled that a court's application of its local rules is a discretionary matter and that failure to insist on full compliance with a rule does not deprive the court of jurisdiction over a matter. *Schacht v. United States*, 398 U.S. 58, 64.